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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 384

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Petitioner*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner files this reply to the brief of the respondent Power Authority of the State of New York in opposition to the petition for a writ of certiorari in order to correct certain misconceptions contained therein as to the nature and basis of petitioner's request to this Court.

Petitioner has suggested (Pet. 11-15) that this Court grant certiorari, vacate the judgment below and remand

the case to the District Court to hold all proceedings in abeyance pending the final resolution of the license review proceedings now pending in the Court of Appeals for the District of Columbia Circuit. The procedural dilemma which makes that suggestion appropriate is due entirely to factors beyond the control of petitioner. It is a dilemma manufactured by the court below as a result of certain assumptions and conclusions which it made, assumptions and conclusions which were neither appropriate nor necessary in the disposition of the appeal.

This proceeding had its origin in an effort by the petitioner to secure a declaratory judgment and injunction in relation to the respondent Power Authority's hasty effort to implement its license by invoking the appropriation procedures of state law. Within a short time after the issuance of the Federal Power Commission license on January 30, 1958, and before any judicial review of that license could be secured, the Power Authority purported to appropriate and take possession of petitioner's lands under the Public Authorities Law and the Highway Law of the State of New York. Petitioner had no alternative but to seek judicial relief from such an effort. It therefore invoked the jurisdiction of the District Court to render a declaratory judgment and injunctive relief to the effect that petitioner's lands could not under the circumstances be appropriated under New York law. It was a jurisdiction entirely distinct from that subsequently invoked in the District of Columbia court to review the license order. In other words, the jurisdiction of the courts below of necessity excluded any determination of the validity of the license, a matter as to which the Federal Power Commission would be a necessary party.

The success and propriety of petitioner's efforts are demonstrated by the holding of the Court of Appeals below—which is uncontested by the respondent Power Authority—that the aforementioned state appropriation proceedings were unauthorized and hence "are vacated and annulled." Pet. 19a. Had the Court of Appeals stopped there, the appeal would have been resolved and matters would then have awaited the termination of the license review proceedings which the court below acknowledged were pending in the District of Columbia court.

Instead, the court below took unto itself the unnecessary and unwarranted task of determining the right of the Power Authority *as a holder of a valid license from the Federal Power Commission* to condemn petitioner's lands. The court thus assumed the very issue in contention before the District of Columbia court, an issue which was within the exclusive jurisdiction of the latter court to resolve. And the court below then compounded its statutory indiscretion by ordering the District Court, should respondent decide to follow the gratuitous suggestion of invoking condemnation proceedings, to "expedite all proceedings as much as possible." Pet. 19a.

Petitioner maintains that the decision below, to the extent that it assumes or guesses that the license is valid and that immediate condemnation proceedings are authorized, disrupts the orderly judicial administration of the Federal Power Act. In short, the decision invades the exclusive jurisdiction to resolve the validity of the license which Congress has given to the District of Columbia court. Considerations of orderly judicial administration dictate that the excesses of the decision below be curbed and that the determination

of the right of the Power Authority *as a licensee under the Federal Power Act* to condemn petitioner's lands await the resolution of the validity of the license.

When the decision below is thus viewed in its proper perspective, the irrelevancies of the respondent Power Authority's opposition to the petition for certiorari become plain. It is thus no answer to say (Brief, 15-19) that the judgment below was rendered by a court of competent jurisdiction and that the judgment was *res judicata* as to all issues which were or could have been litigated. Petitioner has raised no objection to the competency of the jurisdiction of the courts below. Its objection is directed solely to the action of the Court of Appeals in abusing that jurisdiction by attempting to resolve an issue that necessarily must await the outcome of a pending proceeding in another court.

To ascribe *res judicata* concepts to the portion of the judgment below that was unnecessary and unwarranted is to intensify the confusion that already exists. The doctrine of *res judicata* was never meant to apply to an issue that should not have been decided by a court.[1] Indeed, reliance on this doctrine by the respondent Power Authority is explainable only in terms of a desire to exploit the unexpected benefits of the unwarranted decision below. The respondent Power Authority thus is urging before the Court of Appeals for the District of Columbia that the decision below is *res judicata* as to the validity of the Federal

[1] As this Court has said, "a judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered." *Ash Sheep Co. v. United States*, 252 U.S. 159, 170 (1920).

Power Commission license.[2] The fact that such a contention is made only serves to emphasize the error of the court below in overreaching itself in disposing of the appeal before it.

It need hardly be added that respondent's efforts (Brief, 19-23) to demonstrate that petitioner was in no way aggrieved by the issuance of the license on January 30, 1958,[3] and that the Commission's order of that date was entirely proper are without relevance in this case. Such matters are directly involved in the pending appeal before the District of Columbia court and neither add to nor detract from the propriety of granting certiorari in this case.

Finally, the respondent Power Authority has misconstrued both the holding below and the issue which the petitioner seeks to have reviewed by this Court should a remand of the case be deemed inappropriate. The court below properly held that certain federal statutes enacted for the benefit of Indian tribes, 25 U.S.C. §§ 177 and 233, established the paramount authority of the United States over petitioner's lands and prohibit the taking of any portion of those lands without some form of Congressional consent. The only issue as to which petitioner seeks review is the further

[2] Thus at p. 14 of its brief as intervenor in the District of Columbia proceedings, respondent argues that "[u]nder these circumstances, petitioner may not before this Court litigate any question of validity of the license . . . that issue is res judicata between petitioner and the Power Authority."

[3] It is significant that the Federal Power Commission, in its brief in the license review proceedings before the Court of Appeals for the District of Columbia Circuit, makes no contention that petitioner was not aggrieved by the license order of January 30, 1958, or that petitioner lacks standing to contest that order.

holding of the court that the necessary consent of Congress can be spelled out by implication from a general statute that in no way mentions the petitioner or its lands.

Petitioner has no quarrel with the general proposition referred to by the respondent (Brief, 26-27) that in the ordinary affairs of life Indians, like all others, must be deemed included within the scope of a general statute unless explicitly excepted. See *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956). But that general rule is not here applicable since the problem is one of determining if Congress has intended to take away protections and benefits which it previously conferred in specific terms upon Indian tribes. It is in that context that petitioner maintains that a general statute of Congress should not be construed to include Indians, thus depriving them of a specific statutory protection, "unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884).

Any holding that a general statute overrides a historic specific statutory provision designed to protect the wards of the Federal Government is deserving of the most careful scrutiny and review by this Court. As this Court has repeated many times, "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). And see *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956). General expressions, like doubtful expressions, should be construed in favor of Indian tribes. The rejection of that principle by the court below thus creates a novel and important question which justifies the assertion of this Court's certiorari jurisdiction.

CONCLUSION

At stake in this case are important problems of effective judicial administration of issues arising out of a grant of a license by the Federal Power Commission. They are problems which merit the immediate attention of and action by this Court. And they are problems which are made imminent by the pendency of condemnation proceedings. The denial of certiorari by this Court will be a green light for the final condemnation and destruction of petitioner's lands before any decision can be rendered as to the validity of the underlying license by the only court having jurisdiction to resolve that problem.

The necessity for action by this Court is in no way diluted by the claim of the respondent (Brief, 14) that each day's delay adds to the cost of the power project and results in losses to power-users of upwards of $100,000 a day. Part of the calculated risk that any licensee must take is that adherence to statutory procedures and Congressional mandates may cost money.

For these reasons, and those advanced in the petition, the writ of certiorari should issue in this case.

Respectfully submitted,

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